

EXHIBIT 5

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:
5 SECURITIES INVESTOR PROTECTION
6 CORPORATION,

7 Plaintiff,

8 vs. Case No. 08-01789(SMB)

9 BERNARD L. MADOFF INVESTMENT
10 SECURITIES, LLC, ET AL.,
11 Defendants.

12 - - - - - x

13 In the Matter of:
14 IRVING H. PICARD, TRUSTEE FOR
15 LIQUIDATION OF BERNARD L. MADOFF
16 INVESTMENT SECURITIES LLC,

17 Plaintiff,

18 v. Case No. 10-04336(SMB)

19 THE ESTATE (SUCCESSION) OF
20 DORIS IGION, ET AL.,
21 Defendants.

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U.S. BANKRUPTCY JUDGE

Hearing re: (cc-19) Defendants Estate (Succession) of Doris
Igoin, Laurence Apfelbaum, and Emilie Apfelbaum, Motion to
Dismiss Adversary Proceeding

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16

17 ALSO APPEARING TELEPHONICALLY:

18 LAMAR ELLIS

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Mr. Ellis, are you on the line?

THE OPERATOR: Mr. Ellis is not connected yet.

THE COURT: He is not connected yet, all right.

(Recess at 10:07 a.m.)

THE COURT: All right. Madoff and Apfelbaum.

Sorry.

(Pause)

THE COURT: Go ahead.

MR. COOPERMAN: Would you like me to speak from
the podium or here?

THE COURT: Yes, please.

MR. COOPERMAN: Thank you, Your Honor.

May it please the Court, we are here today -- my
name is Jonathan Cooperman from the law firm of Kelley, Drye
& Warren and I represent the defendants in this adversary
proceeding and we're here on our motion to dismiss for lack
of personal jurisdiction and for form non-convenience.

Your Honor undoubtedly has seen a lot of Madoff
cases with unique facts. Your Honor, this is one of them.
My clients are a French psychologist and a student, their
names are Laurence Apfelbaum and Emilie Apfelbaum.
Laurence, Your Honor is a female name, just for the record
to be clear.

1 THE COURT: I figured that one out after a while.

2 MR. COOPERMAN: Okay. Thank you, Your Honor. A
3 lot of people -- a lot of people don't at first.

4 They're French citizens, they live and work and
5 reside in Paris, France.

6 The trustee makes no allegation that my clients
7 have any connections anywhere in the United States --

8 THE COURT: Well they have New York accounts
9 though, right?

10 MR. COOPERMAN: Aside from their BLMIS accounts.
11 It's important, Your Honor, I want to get to that
12 jurisdiction, but I want that record to be clear.

13 The trustee attempts to lump together my clients
14 with Albert Igoïn, I-G-O-I-N, who is the late deceased
15 father of Laurence Apfelbaum.

16 Your Honor, they're very different. Mr. Igoïn
17 died in 1995. At that time his daughter, Laurence, his
18 granddaughter, Emilie -- Emilie was only 11 years old at the
19 time -- inherited the BLM -- inherited money and those --
20 that money largely was BLMIS accounts.

21 Now, Your Honor, at that time Laurence Apfelbaum
22 was free to choose to invest what she wanted -- to invest
23 her money where she wanted. Emilie, Your Honor, was 11
24 years old, and her inheritance was subject to a French
25 guardianship judge, which is equivalent to a French -- a

1 family law judge here in New York.

2 The evidence shows, Your Honor, that the French
3 guardianship judge required that Emilie Apfelbaum invest
4 half of her money in French treasury bills because that was
5 a safe investment and that's what --

6 THE COURT: When did she turn 21?

7 MR. COOPERMAN: She was 11 years old in 1995, Your
8 Honor, so she would have turned 21 in 2006.

9 THE COURT: All right. And she determined to
10 leave her money in BLMIS at that point, right?

11 MR. COOPERMAN: She did, Your Honor. She did,
12 there's no question about that, but I'd like to focus a
13 second on what happened in 1995, because I think that's
14 relevant to the issue of jurisdiction.

15 The reason is, Your Honor, is that what the French
16 guardianship -- judge required is for Emilie Apfelbaum, if
17 she wanted to leave her money with BLMIS then Madoff had to
18 give guarantees that the money was safe. And what happened
19 is, Your Honor --

20 THE COURT: Well she could lose five percent. I
21 think that's what it was.

22 MR. COOPERMAN: That's right, Your Honor. That it
23 couldn't lose more than five percent in any one year, but
24 for purpose of jurisdiction what's very important, Your
25 Honor, is that Madoff came to France -- Paris, France, he

4 THE COURT: I know the argument, but this isn't a
5 contract case, this is a fraudulent transfer case. Contract
6 has nothing to do with the trustee's claim, or tell me how
7 it has something to do with -- not the jurisdictional issue,
8 but the claim.

9 MR. COOPERMAN: Well, I'm focusing right now on
10 jurisdiction, Your Honor. I understand the trustee's
11 theory, but the fact is, is that -- and I want to go through
12 this with you, all of -- some other facts that go to
13 jurisdiction if Your Honor will let me --

14 THE COURT: Go ahead.

15 MR. COOPERMAN: -- that merely -- what the cases
16 hold for jurisdiction is that merely maintaining the account
17 in New York by itself is not sufficient for jurisdiction.

18 THE COURT: Let me ask you a question. There
19 wasn't -- I didn't see it in anybody's papers.

20 MR. COOPERMAN: Yes, Your Honor.

21 THE COURT: I see all these withdrawals from the
22 accounts.

23 MR. COOPERMAN: Understood, Your Honor.

24 THE COURT: How did they come about? Did somebody
25 make a request for money?

1 MR. COOPERMAN: Yeah. Your Honor, so what I was
2 going to say is the contacts with New York are largely
3 because of France you have to pay wealth taxes and --

4 THE COURT: No, no, I'm asking a different
5 question. If I look at Exhibit B -- I think it's Exhibit B
6 to the complaint --

7 MR. COOPERMAN: Understood.

8 THE COURT: -- it lists a lot of withdrawals --

9 MR. COOPERMAN: Yes, Your Honor.

10 THE COURT: -- with some deposits, a lot of
11 withdrawals. And the question I had is how did these
12 withdrawals come about? Did somebody send a request to
13 BLMIS to withdraw money?

14 MR. COOPERMAN: What was -- there was a request
15 made, yes, to withdraw money --

16 THE COURT: So every time there's a withdrawal
17 that means that a request came into BLMIS in New York to
18 withdraw money.

19 MR. COOPERMAN: That's correct, Your Honor.

20 THE COURT: All right.

21 MR. COOPERMAN: That's correct. So that is
22 clearly what happened here.

23 I want to call your attention to one thing -- a
24 couple things on the French language contract and then
25 address some of the other context aside from calling in

1 to -- to request money for French wealth taxes.

2 These agreements they're in French, they're simple
3 one-page agreements, they're very different from the other
4 BLMIS agreements that have been in adversary proceedings
5 before this Court. The agreements do not contain a New York
6 choice of law clause, they don't contain the clause
7 appointing a New York agent, there's nothing in the
8 agreements of the accounts even being held in New York
9 beside from Mr. Madoff's address New York is not mentioned.
10 It's unrebutted, Your Honor, that these particular
11 agreements are subject -- they were negotiated in France and
12 they're subject to French law.

13 THE COURT: But it's not a contract. I keep
14 coming back to the same question. Are you telling me that
15 if somebody receives a -- well this may answer the
16 question -- but if somebody receives a fraudulent transfer
17 from a New York account that's governed by French law?

18 MR. COOPERMAN: Well what I'm saying, Your Honor,
19 is the differences here is that that's not quite the point I
20 was trying to make. The difference here is that in many of
21 the personal jurisdiction cases in Madoff the issue came
22 down to the defendants signed a Madoff classic account
23 agreement, and that person whether they be in Europe, Asia,
24 what have you, that agreement said you subject yourself to
25 New York jurisdiction.

1 My bigger point here is this is a special one-page
2 French document which does not contain that.

3 THE COURT: All right. And I agree with you on
4 that. I've seen those cases. I've also seen other cases
5 that say simply maintaining an account in New York is
6 enough.

7 MR. COOPERMAN: Well, I want to -- I want to go to
8 that in one second, Your Honor.

9 THE COURT: Let me ask you the question
10 differently.

11 MR. COOPERMAN: Please.

12 THE COURT: Are you saying that the choice of law
13 clause -- New York choice of law clause is a sine qua non of
14 personal jurisdiction in the case?

15 MR. COOPERMAN: It's one important factor in a lot
16 of these cases.

17 If I may, Your Honor, let me address the law, then
18 let me come back to some of the facts, because I think the
19 law is very important.

20 In -- the trustee's amended complaint states that
21 jurisdiction in this case is based on CPLR 302(a). That's
22 right --

23 THE COURT: Actually I had a question about
24 that --

25 MR. COOPERMAN: Please.

1 THE COURT: -- for both sides.

2 The only claim -- as the law now stands the only
3 claim that the trustee has is a bankruptcy claim going back
4 two years. Does the CPLR apply to that or is there some
5 federal law of specific jurisdiction that applies to that
6 and are they different?

7 MR. COOPERMAN: I don't think, Your Honor, there's
8 any practical difference, and the reason is, is because the
9 trustee has not identified any -- because there are none --
10 any contacts that my clients have anywhere else in the
11 United States that would support federal jurisdiction. The
12 only contacts in the entire United States that my clients
13 have are these accounts here in New York.

14 THE COURT: But under federal non-CPLR specific
15 jurisdiction law. If somebody never comes into the state
16 but avails themselves of activities in the state or does
17 something outside the state that has a consequence inside
18 the state, which is generally my understanding of the CPLR
19 specific jurisdiction, does the same law apply under more
20 general federal specific jurisdiction law?

21 MR. COOPERMAN: Yes, Your Honor.

22 THE COURT: Okay.

23 MR. COOPERMAN: It does. In fact the -- every --
24 even under the long arm statute the cases the trustee cite
25 hold that specific jurisdiction requires that the claims

1 alleged arise out of the federal activities. And that's in
2 the In re: Bozell (ph) case cite by the trustee.

3 The point is, Your Honor, that in this situation
4 what we have here is this action does not arise out of the
5 Apfelbaum's accounts. What it arises out of is Madoff's
6 activities.

7 THE COURT: I thought it arose out of transfers
8 from the Apfelbaum accounts?

9 MR. COOPERMAN: Well let me read to you paragraph
10 1 of the amended complaint, Your Honor. It says, "This
11 adversary proceeding arises from the massive Ponzi scheme
12 perpetrated by Madoff."

13 Your Honor, in every case that has been cited
14 either by the trustee or by my clients in the briefs before
15 you, there is more activity in New York to support personal
16 -- let me start again. In cases where personal jurisdiction
17 is found, Your Honor, in every case cited by either the
18 trustee or myself, there was more activity in New York, more
19 connections in New York than simply maintaining an account
20 here.

21 If I can walk you through just a couple of the
22 cases to show you some examples, Your Honor. In the Maximum
23 Absolute Return Fund case, which was a Madoff case, in that
24 case it was a Connecticut-based feeder fund, there was a
25 BLMIS contract with a New York choice of law clause, and the

1 court stated, quote:

2 "The Second Circuit has indicated that entering
3 into a contract with a New York choice of law clause is a
4 significant factor in a personal jurisdiction (indiscernible
5 - 00:10:26), because the parties invoke the benefits and
6 protections of New York law."

7 The Picard versus Chase case, Your Honor, which
8 was cited by the trustees, there was a designation of a New
9 York agent and also this was only looking federal contacts
10 as a whole, there was also a California bank account
11 maintained.

12 In the Picard versus Comad (ph) Securities Corp.
13 case, another case cited by the trustees, there was a New
14 York choice of law clause and also a designated New York
15 agent.

16 In Malachi versus Lebanese Bank case, which was
17 cited just -- New York Court of Appeals case, it was cited
18 in our briefs. You had a situation where a corresponding
19 bank in New York was getting millions of dollars transferred
20 here into New York, I think it was on dozens of transactions
21 in New York, with the express purpose to use the New York
22 account to benefit the Hezzbollah terrorist group, so --

23 THE COURT: But to benefit the Hezzbollah
24 terrorist group that may have had something to do with the
25 causation, the second part of the test, but here when I look

THE COURT: But that's -- you know, that's the
unfortunate truth of just about every defendant in every one
of these net profit cases, they all had to pay taxes, and I
guess I assume that they had to withdraw money to pay taxes.
Maybe not as much as your clients had to pay because of the
French tax laws, but it's an unfortunate truth in every one
of these situation.

20 Let me focus, Your Honor, which this is a very
21 crucial part of our argument, on other cases in which all
22 that they had was our situation where there was a bank
23 account in New York and the passive receipt of income from
24 that account, and the outcome is very different.

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1 cited. First I'll start with the Societe Generale versus
2 Florida Health Science Center case, this was a 2003 case
3 decided by Judge Cedarbaum in the South District. In that
4 case a Florida bonding company which was issuing bonds for a
5 Tampa-based hospital had a \$12.9 million account here in New
6 York with Societe Generale. The purpose of that account the
7 court found was to make money for the bonding company. It
8 had a guaranteed interest rate of seven percent.

9 And what Judge Cedarbaum said, Your Honor, is if I
10 can quote"

11 "Contrary to Societe Generale's contentions,
12 maintenance of a bank account in New York is usually
13 insufficient to confer personal jurisdiction over a non-
14 domiciliary defendant even in suites arising from that
15 account."

16 THE COURT: Isn't that pre-Leechy (ph) law though?

17 MR. COOPERMAN: I don't see how it changes though,
18 Your Honor, because if I can continue to talk about this --

19 THE COURT: Because I think you have to look at
20 the quality and the quantity --

21 MR. COOPERMAN: Absolutely.

22 THE COURT: -- of the account.

23 MR. COOPERMAN: Absolutely, Your Honor. But I
24 think what Leechy stood for is that somebody who is not in
25 New York -- well let me give a different analogy. That if

1 my clients never dealt with Madoff but only had a French
2 correspondence bank that's I believe what Leechy stood for.
3 What Leechy did not stand for is to say that if you just
4 maintain an account in New York and have nothing else and do
5 nothing else --

6 THE COURT: I agree with the if you do nothing
7 else, but I come back to my question that your clients did
8 more than nothing else, because at a minimum there are
9 hundreds of deposits and withdrawals over the years in these
0 accounts, and even if I looked more recently and I don't go
1 back to 1995, and you're telling me that everyone of those
2 was proceeded by some sort of request to send money.

13 MR. COOPERMAN: But, Your Honor, if I can also --
14 I'd like to continue talking about that Societe Generale
15 case, but before I do I'd address Your Honor to the Divinsky
16 (ph) versus Kingsford case, a Judge Carati (ph) case from
17 2008. That was a situation where there were claims to
18 recovery monies wrongfully -- allegedly wrongfully obtained
19 by a defendant in Florida as part -- that they received as
20 part of a New York fraudulent scheme, and the claims were
21 sought based on the same debtor and creditor laws as the
22 trustee has asserted in this case against my client.

23 And what Judge Carati said was -- he said, quote:

24 "It is settled however that passive receipt of
25 allegedly stolen funds absent evidence of knowledge or

1 intent is an inadequate basis for the court's exercise of
2 jurisdiction under 302(a)(2)."

3 THE COURT: Knowledge or intent -- knowledge of
4 the Ponzi scheme.

5 MR. COOPERMAN: Yes. Exactly, Your Honor.

6 So I think that's a very relevant case. It's no
7 different than with the Société Générale case. I wanted to
8 call Your Honor's attention to other parts of the Société
9 Générale case because in that case the Court distinguished
10 the very type of cases the trustee cites here. The Court in
11 the Société Générale case talked about other cases where
12 there was a foreign selection clause, where there was a
13 promissory note with actually New York connection.

14 And what the Court said is that after the Florida
15 bonding company in that case deposited the money into New
16 York, their New York connections were, quote, "limited to
17 passive acceptance of interest payments and monthly
18 statements in Florida."

19 THE COURT: I guess I'm hung up on the word
20 "passive" because you've used it a couple of times. Here,
21 as I understand it, your clients weren't just receiving
22 monthly statements and interest payments that were
23 automatically generated without request. They were
24 receiving a significant number of payments or checks or wire
25 transfers over the years.

1 MR. COOPERMAN: With all due respect, Your Honor,
2 I think that's a distinction without a difference here. I
3 think what the cases say is that on the one hand, if you
4 have an account in New York and an out-of-state person does
5 nothing more than have that account and get monies from that
6 account versus the other cases that the trustee largely
7 relies on where a much greater deal of activity was done
8 within New York, which leads me, Your Honor, for -- I'd like
9 to focus on that because that's the other important part of
10 my presentation.

11 What the trustee has alleged, they made very
12 sweeping statements, especially, as Your Honor knows, we had
13 briefing in 2012 and then we had 18 months of jurisdictional
14 discovery. If you look especially at the briefs of 2012,
15 there are sweeping statements made by the trustee that my
16 clients were, quote, "anything but ordinary investors; they
17 were acutely aware of the purported activity in the
18 accounts. They acted deliberately, and so forth."

19 THE COURT: I don't pay attention to conclusory
20 statements like that. And I do have a question. There's
21 been a lot of smoke and heat over the years in this case
22 about the facts and I question whether there's really a
23 dispute regarding the facts, supposed to the adverbs, the
24 adjectives, and the conclusory statements. The trustee
25 basically has a summary of facts in his supplemental memo,

1 which I guess he filed after the jurisdictional discovery --

2 MR. COOPERMAN: Correct, Your Honor.

3 THE COURT: -- in response to yours, and he cites
4 a lot to Mrs. Apfelbaum's deposition, and I'm just wondering
5 if there's any dispute as to those facts.

6 MR. COOPERMAN: Well, there's actually a huge
7 dispute, Your Honor, because --

8 THE COURT: Okay. So you're tell me there's a
9 fact -- let me stop you -- and here's an issue I have with
10 this case. You're telling me there's factual dispute
11 regarding personal jurisdiction?

12 MR. COOPERMAN: No, I'm not, Your Honor.

13 THE COURT: I just asked you.

14 MR. COOPERMAN: I misstated what I said.

15 THE COURT: Okay.

16 MR. COOPERMAN: There is no dispute. The record
17 speaks for itself.

18 THE COURT: Well, the record is long at this point
19 and there are a lot of papers.

20 MR. COOPERMAN: But it's not, Your Honor, because
21 I think if you examine fairly very sweeping statements made
22 by the trustee and compare it to the evidence cited, the
23 evidence doesn't support it.

24 Your Honor, if I can -- just as an example, Your
25 Honor, the trustee is to show our -- my client's active

1 participation in New York. The trustee has cited a total of
2 four documents over a 13-year period. Your Honor, they've
3 made big statements in 2012, briefing as to what they meant.
4 All of those statements are demonstrated by future -- by
5 subsequent discovery not to be accurate.

6 Your Honor, if I could just point to you, three of
7 those faxes are from 1999. They are all handwritten
8 documents. The first one is a May 10th, 1999, fax which
9 simply in that, Laurence Apfelbaum wrote to Frankie
10 DePasquale (ph) and said essentially the French tax
11 authorities made a mistake. They undercalculated their tax
12 and she has to withdraw a lot more money than anticipated.
13 That's it.

14 A second fax, Your Honor, is an October 12th,
15 1999, fax, and in that case, what Laurence Apfelbaum
16 testified was that she was merely telling -- reminding Mr.
17 DePasquale to sell a French Treasury bill before it matured.
18 And what the -- the trustee makes a big deal out of it, but
19 the trustee doesn't cite the testimony to put this in
20 context.

21 And what that testimony said, Your Honor, was Ms.
22 Apfelbaum was informed under French law that if a Treasury
23 bill was held to maturity it was taxed at a high rate, I
24 think 50 percent. If it was sold the day before maturity,
25 it was taxed at 25 percent.

1 THE COURT: Well, what does that have to do with
2 the fact of the contact?

3 MR. COOPERMAN: Because, Your Honor, the -- I
4 believe -- well, the law provides, as we've cited, that what
5 the trustee needs to do to establish jurisdiction here is
6 not simply to say there's a maintenance of account, but
7 somehow that we were active participants in the strategies
8 of the account and investing, which is what they're trying
9 to do, Your Honor. And that's why as a total, they cited
10 four faxes to show that, but that doesn't show it.

11 THE COURT: The trustee's supplemental memorandum
12 of law --

13 MR. COOPERMAN: Yes, Your Honor?

14 THE COURT: -- lists from pages 5 to 11, what it
15 calls -- what he calls supplemental statement of facts
16 derived, I guess, from the discovery -- largely from Mrs.
17 Apfelbaum's -- Dr. Apfelbaum's deposition.

18 Do the Defendants dispute any of those facts?

19 MR. COOPERMAN: We do, Your Honor. Just give me
20 one second.

21 THE COURT: But if you do, don't I have to have an
22 evidentiary hearing to decide the issue?

23 MR. COOPERMAN: Well --

24 THE COURT: That's one of the problems here. I
25 understand the tension of dragging -- I shouldn't say

1 dragging -- bringing your clients in to participate in an
2 evidentiary hearing to prove that they shouldn't be here in
3 the first place, but how do I resolve this evidentiary
4 dispute?

5 MR. COOPERMAN: Well, if that's what Your Honor
6 wants --

7 THE COURT: That's the question I have. I'm
8 asking you.

9 MR. COOPERMAN: Thank you, Your Honor.
10 I wasn't meaning to be smart there.

11 THE COURT: No.

12 MR. COOPERMAN: The -- in my view, if you look at
13 the statements made in the trustee's supplemental
14 memorandum, and then if you look at the evidence and the
15 factual citations, those factual citations do not support
16 what the trustee says, and, in fact, Your Honor, if you then
17 look at our supplemental papers, we put all of these
18 statements into context.

19 As an example, Your Honor, I just mentioned about
20 the point where what the trustee is talking about, these
21 sales of French Treasury bills, and the trustee would
22 present this as if this was some, you know, a financial guru
23 who was sitting there saying sell, buy, at different times,
24 when all that she was doing in context was -- and she
25 testified, she said if she saw in his statement that Frank

1 DePasquale, that a Treasury bill was coming up due in a week
2 and it hadn't been sold, she would let him know to sell it.

3 THE COURT: But I saw another fax or e-mail in
4 which there was a much more-detailed plan about minimizing
5 Emilie's taxes.

6 MR. COOPERMAN: Oh, that's a perfect example, Your
7 Honor, of what I talked about of the record not being stated
8 properly. Because that fax was part of the trustee's 2012
9 submission. And if you look at the trustee's 2012
10 submission, the trustee said that that fax shows -- I wrote
11 it down here -- quote, "actively directed trading strategy,"
12 okay?

13 Curious, Your Honor, that the trustee has not then
14 relied on that fax in their post-jurisdictional discovery, a
15 briefing, and the reason is it's explained in our post-
16 discovery brief at pages 20 to 21, because what the
17 testimony was is Laurence Apfelbaum's tax advisor was trying
18 to figure out what Bernie Madoff was doing because he put a
19 put and hold strategy in place, supposedly, to comply with
20 the Emilie Apfelbaum French law contracts, and you can't
21 lose more than five percent.

22 What Laurence Apfelbaum testified is that actively
23 directing strategy memo, simply, her tax advisor dictated it
24 to her and said, Run it past Madoff; is this what they're
25 doing? So, you know, there's a sweeping statement that

1 somehow my client is somehow engaged in active strategy,
2 but, again, I think the big takeaway that I would ask Your
3 Honor from this oral argument was to please closely examine
4 the evidence. I know Your Honor does all the time, but I
5 think that you will find that our statements and our putting
6 the evidence in context shows this is a French psychologist.
7 It's not somebody who had a trading strategy.

8 In fact, I think it's also interesting, Your
9 Honor, for the two days of depositions they took of Laurence
10 Apfelbaum, nowhere are there in there any quotes about
11 discussions of her expertise in finances. In fact, Ms.
12 Apfelbaum testified, quote, "I've never known exactly what
13 the strategy was. I only noticed that on the monthly
14 account statements there were dividends or equities. I
15 don't know anything about the stock exchange. All I know is
16 that I was told they were either Treasury bills or equities,
17 stocks. I've never seen anything else."

18 The point is I've gone in various ways here, but I
19 believe that in order to prove 302 jurisdiction or the
20 federal specific jurisdiction, it doesn't make a difference
21 here because only the BLMIS accounts are the only New York
22 issues here, either way you've got to show that your claim
23 arises out of those accounts. The case law is -- we've
24 cited the Dovinsky (ph) case. There's also a case that's
25 Judge Koeltl's case, the International Customs Associates,

1 which is cited by the Société Générale case. In that case
2 you had a situation where Judge Koeltl declined to find
3 jurisdiction over a Taiwanese company where all meetings
4 regarding the parties' contract were in Taiwan and it
5 involved what business the New York company would do for the
6 Taiwanese company and were subsequently, there were only
7 phone calls into New York.

8 The point is, Your Honor, that all of these cases
9 say that simply having a BLMIS account here is not
10 sufficient. What their case arises out of the fraud and
11 as -- if I can quote one other -- on the late Judge Bayer
12 (ph) in the online market case which we cited, he states,
13 quote, "The relevant focus under CPLR 302 is on what the
14 Defendant did in New York in connection with the cause of
15 action, not the Plaintiff's actions." So the cause of
16 action here is the massive fraud that Mr. Madoff
17 perpetrated.

18 THE COURT: No, the cause of action are the
19 fraudulent transfers. That's what this case is about.

20 MR. COOPERMAN: That's right and that still, it's
21 the activity of Mr. Madoff, as opposed to our activity of
22 our -- any -- our receipt, my client's receipt of those
23 fraudulent transfers was not here in New York and that's
24 what Judge Prodding (ph) focused on in the Dovinsky case,
25 and so we think this is a very, very different situation.

1 I'd like to move on if --

2 THE COURT: I have one question for you.

3 MR. COOPERMAN: Of course.

4 THE COURT: Are any of the jurisdictional facts
5 implicated in the merits of the case?

6 MR. COOPERMAN: Yes and no, Your Honor.

7 THE COURT: What's the yes part?

8 MR. COOPERMAN: I'm thinking about this. It's a
9 good question.

10 THE COURT: I'm going to give you a chance to
11 think about it because if I do decide to have a trial on the
12 issue of personal jurisdiction, it may depend on whether I
13 have a separate trial or try it with the merits.

14 MR. COOPERMAN: I see where Your Honor is going on
15 that. You know, this goes to what I want to talk about
16 before the forum non conveniens, and I will go out of turn
17 here because I also want to cover the SIPA matter -- the
18 SIPA filings.

19 Would Your Honor like me to --

20 THE COURT: Well, that's part of the
21 jurisdictional argument.

22 MR. COOPERMAN: It is, Your Honor. So, should --

23 THE COURT: You've got the floor.

24 MR. COOPERMAN: Okay. If you don't mind, I would
25 like to cover SIPA and then go to the forum non conveniens.

1 THE COURT: Okay.

2 MR. COOPERMAN: The trustee has alleged that the
3 filing of the SIPA forms is, itself, good enough by itself
4 for jurisdiction and Your Honor --

5 THE COURT: And I wanted to ask you on that one:
6 What happened to the claims that your client submitted? Is
7 there still a claims that allowance dispute, I guess?

8 MR. COOPERMAN: I believe they were denied. The
9 trustee may --

10 THE COURT: And the Defendants never objected to
11 that denial?

12 MR. COOPERMAN: We didn't do anything after that
13 point.

14 THE COURT: Okay.

15 MR. COOPERMAN: So what happened, Your Honor, is
16 Laurence Apfelbaum was not represented by counsel at the
17 time that she filed these SIPA forms; that's her testimony.
18 The trustee's cases, which they have, have cited do not --
19 none of them are situations in which a SIPA form filing
20 gives rise to jurisdiction. The cases they have cited are
21 different if you submit a bankruptcy proof of claim.

22 THE COURT: So what's the difference?

23 MR. COOPERMAN: Big difference, Your Honor.

24 So the bankruptcy proof of claim, it's clear on
25 there. Bankruptcy proof of claim, the form has the name of

1 the court, the title, the docket number, under bankruptcy
2 rules, Form F9, the form has to say the following statement:
3 Filing a proof of claim submits the creditor to the
4 jurisdiction of the Bankruptcy Court --

5 THE COURT: Can I ask you a question?

6 If you were litigating the allowance of your
7 client's claim, based on what your client had sent in to
8 Texas or wherever, would you be arguing that this Court
9 lacks jurisdiction to determine the allowability of that
10 claim because this is a SIPA case?

11 MR. COOPERMAN: I haven't considered that issue
12 yet. I mean I --

13 THE COURT: I'm asking you to consider it.

14 MR. COOPERMAN: They might.

15 THE COURT: So you submit a claim and when it's
16 disputed, you say the Court can't hear it?

17 MR. COOPERMAN: There's a difference, though, Your
18 Honor. Because the difference is that if I was representing
19 Mrs. Apfelbaum from day one, I would have talked to her and
20 we would have perhaps more closely considered what we were
21 going to do. I might have advised her about what a net
22 winner is, what a net loser is. I would have given her all
23 of her options. Frankly, Your Honor -- and I'm not a French
24 law expert -- but I do not know what options she might have
25 in France about this. So, you know, I would not only have

1 given her my thoughts on bankruptcy law, but I would have
2 involved French counsel.

3 So Your Honor is asking a simple question and one
4 obvious answer, I guess would be yes, but I think that it's
5 too simple a question for this situation. There are just a
6 lot of moving parts. The fact is, Your Honor, that unlike a
7 bankruptcy form where it says -- it says that you should
8 hire a lawyer -- you should consider it. The form says
9 you're going to submit yourself to the jurisdiction of the
10 Bankruptcy Court with the consequences that a lawyer can
11 explain.

12 Obviously Your Honor has seen those forms before
13 and, you know, whether you are the most serious investor in
14 the world or whether you're like my clients, a psychologist
15 and a student whose second language is English, you'd read
16 that and you'd say, gotta be careful. There's nothing here
17 like that, nothing at all in our situation.

18 So the fact is that that SIPA form claim should
19 not subject a jurisdiction. Again, none of the trustee's
20 cases --

21 THE COURT: But aren't you just saying she's
22 ignorant of the law or are you saying that there's some due
23 process argument somewhere in this case?

24 MR. COOPERMAN: That was an eloquent way to put my
25 argument, Your Honor, because I think -- well, I know what

1 the argument is. In order to have jurisdiction, you have to
2 have a conscious decision to submit yourself to the
3 jurisdiction of the Court.

4 The case we cited, the In Re Petrucci case, which
5 was a District of New Jersey case, talked about the fact
6 that even looking at a bankruptcy proof of claim form with
7 the bells and whistles saying, warning, you may be subject
8 to jurisdiction, even in that situation, its allowance is
9 equitable based upon the facts of the case. It's an
10 equitable decision, even in a bankruptcy proof of claims
11 situation.

12 And I would say here, Your Honor, if we consider
13 the facts, you had a French psychologist, no experience with
14 investing. Clearly at the time she was vulnerable, she just
15 lost her presumed fortune. She hadn't even consulted an
16 attorney. What she received actually contrary to saying
17 warning, you may be sued in New York when she sent something
18 to Texas, it said SIPA is there to protect you. I don't
19 think that she understood the difference. That's a big
20 point, Your Honor, whether you consciously subject yourself
21 to jurisdiction.

22 And, again, coming back to Your Honor's question,
23 the more I think about it, it's not a simple answer.

24 THE COURT: I think it is, but why don't you move
25 on to forum non conveniens.

1 MR. COOPERMAN: Okay. May I say -- before I --
2 may I say five sentences on magnify?

3 THE COURT: Yeah, I don't know -- I've read the
4 papers. It's not clear to me what that has to do with this
5 case, but --

6 MR. COOPERMAN: No me.

7 THE COURT: -- maybe you can save that for
8 rebuttal.

9 MR. COOPERMAN: Okay. We spent 18 months of
10 jurisdictional discovery on it. I'm not clear as well.

11 I'll move on to forum non conveniens, Your Honor.

12 THE COURT: Thank you.

13 First question on forum non conveniens: Your
14 expert says that there's a five-year statute of limitations
15 on fraud claims. It's now more than five years since
16 December 11th, 2008 --

17 MR. COOPERMAN: Right.

18 THE COURT: -- so aren't all of these claims time-
19 barred in France?

20 MR. COOPERMAN: No, Your Honor.

21 This was raised by the trustee in the last
22 supplemental memo. We have not had a chance to respond to
23 it. What I would like to do, Your Honor, and it's
24 noteworthy that they didn't put any sort of affidavit from
25 their French law expert in about this, but Mr. Quint, I've

1 talked to him, he's our French law expert, he will say that
2 in France, statute of limitations is a defense which you can
3 assert. It's up to the Defendant whether to assert it.

4 THE COURT: Well, the same is true here.

5 MR. COOPERMAN: Well, okay, but I want to make
6 sure that's the law in France. So my point is, Your Honor,
7 when you have this forum non conveniens dismissal, it's
8 always based on conditions and as one condition we would, of
9 course, stipulate that we would not assert or my clients in
10 France -- I won't be part of it then -- will not assert a
11 statute of limitations defense.

12 THE COURT: Okay.

13 MR. COOPERMAN: And that is clear, and we would
14 like the opportunity to put in a supplemental statement if
15 Your Honor would allow us to do so. For Mr. Quint to
16 complete the record that shows that, in fact, just like in
17 America, it's a waivable defense and (indiscernible -
18 10:42:57).

19 If I can continue forum non conveniens, Your
20 Honor?

21 THE COURT: I had that initial question.

22 MR. COOPERMAN: Oh, it's a good -- it's a perfect
23 question, Your Honor. You know, talking about whether
24 France is an adequate forum, you don't take my word for it,
25 Your Honor, please take the trustee's word for it. When

1 they submitted their -- when the trustee submitted his
2 application for a French law firm, UGCC & Associates, what
3 he -- the stated reason for hiring -- for this Court to hire
4 that French law firm was it's necessary -- this is a quote
5 from their application, "It's necessary to engage special
6 counsel to represent the trustee in connection with
7 litigation --" one -- and that's my one -- "where French law
8 is implicated or the Defendants are located in France."

9 Now, clearly, Your Honor, we have the or. The
10 Defendants here are located in France. That's the exact
11 stated reason for the trustee.

12 THE COURT: Are you saying it's a concession that
13 the trustee has agreed to try this case in France?

14 MR. COOPERMAN: No, I think it's a concession,
15 Your Honor, that this is a very unusual, which is an
16 understatement, bankruptcy situation where you have
17 Defendants all throughout the world, and in this situation,
18 I think it's a concession by the trustee that where
19 Defendants are in France, it may be well appropriate to have
20 the trustee's eminent French counsel participate in this.

21 Your Honor, if you look --

22 THE COURT: It certainly may well be appropriate,
23 but it may also be well appropriate to have their eminent
24 counsel in New York try the case.

25 MR. COOPERMAN: Well, let me explain why I

1 think --

2 THE COURT: And the Defendant's eminent counsel in
3 New York.

4 MR. COOPERMAN: Well, I prefer not to, Your Honor.
5 But in all seriousness, there are a couple of reasons I
6 think which heavily weigh in favor of France. First of all,
7 just on UGCC for one second. This is not some counsel who's
8 been on the back shelf doing nothing. Since our last
9 October, 2012, appearance before Judge Lifland, they put in
10 fee applications for \$750,000. I can't tell if that's U.S.
11 dollars. I can't tell what they're doing because that's not
12 in the fee application, but for that amount of money they're
13 either litigating cases just as they said they would or
14 they're certainly up to speed in order to do so.

15 THE COURT: What does that have to do with forum
16 non conveniens? I'm sure that the trustee can go out and
17 hire the finest French counsel --

18 MR. COOPERMAN: What it has to do, Your Honor --

19 THE COURT: -- if he had to.

20 MR. COOPERMAN: -- because ordinarily in a forum
21 non conveniens situation, the Plaintiff's choice of forum is
22 given deference. My point here is that the trustee, the
23 Plaintiff here, has made applications to this Court to say
24 that, in essence, to say I've got great New York counsel and
25 I've got great French counsel and I am going to -- when I

1 have situations when Defendants are in France, I'm going to
2 use my great French counsel.

3 So my point about saying this, Your Honor, is to
4 the extent the trustee is going to argue, and has argued in
5 its papers, that their choice of a New York forum be given
6 deference, it should be in this situation. That's my point,
7 Your Honor.

8 If I can continue, the public and private factors
9 strongly weigh in favor of my client, and let me give you
10 two concrete reasons. First of all, Your Honor, let's talk
11 about witnesses. When we go to the merits of this case --

12 THE COURT: What are the merits of this case?
13 This is a strict liability case. It's a fictitious profits
14 case, isn't it?

15 MR. COOPERMAN: Well, it's not, Your Honor.

16 THE COURT: What are the defenses to a fictitious
17 profits case?

18 MR. COOPERMAN: It depends on when value was given
19 to the account. If you --

20 THE COURT: But no value was given beyond the
21 principal. That's said of law, and maybe there's a time
22 value of money attributable to it and that is an argument.
23 I understand that's in the circuit.

24 MR. COOPERMAN: Okay. When the trustee -- if you
25 read the amended complaint, the trustee would say the value

1 of this account goes back to the 1970s when Albert Igoin put
2 in whatever money he did.

3 THE COURT: But that's for the purposes of
4 determining the net investment method. That's all resolved.

5 All that the trustee can recover, as the law
6 presently stands, is up to the transfers made within two
7 years of the filing date.

8 MR. COOPERMAN: Right. But there's a value
9 component in there too, what value was given to -- what the
10 value was given, and my point is, Your Honor, if you measure
11 the value from 1970 versus if you measure the value from
12 when Emilie Apfelbaum, who inherited money, put in 1995, you
13 come up with a very different net winner versus net loser
14 equation.

15 THE COURT: I don't understand that. The trustee
16 had seen the calculations. You haven't told me that you
17 have evidence that shows different calculations of the cash
18 in and cash out of the account, so I'm not understanding how
19 you come up with a different number.

20 MR. COOPERMAN: Well, we haven't gotten to that
21 point yet, Your Honor. So I see what's in the complaint.

22 THE COURT: The question -- the reason -- well, a
23 lot of stuff has happened in terms of the law since even the
24 amended complaint.

25 MR. COOPERMAN: Oh, sure.

1 THE COURT: But, you know, I hear things about
2 witnesses in France, but to me this is a relatively
3 straightforward case because the trustee is not alleging,
4 for example, that your clients knew that BLMIS was a Ponzi
5 scheme which would open them up or subject them to liability
6 for the principal, as well as the net profits.

7 And in terms of what net profits are and how
8 they're calculated, that's been resolved by the Second
9 Circuit.

10 MR. COOPERMAN: Well, it has been resolved by the
11 Second Circuit, Your Honor, and I don't have a formula right
12 here in my outline, so I don't want to --

13 THE COURT: It's cash in and cash out over the
14 life of the account.

15 MR. COOPERMAN: Yeah, but it's also -- yes, Your
16 Honor --

17 THE COURT: Or at least that's what some other
18 circuits have said. The circuit -- more circuits didn't
19 quite say that.

20 MR. COOPERMAN: Right. But there's also a
21 component of how much value you gave to the account in the
22 first place.

23 THE COURT: But beyond the cash in, what's the
24 value?

25 MR. COOPERMAN: It depends on when the cash -- it

1 depends on when the cash was put in when you measure it
2 from.

3 THE COURT: Not under the net investment method,
4 though, that's what I'm saying.

5 MR. COOPERMAN: But the document you're flipping
6 through, Your Honor, brings us back to the 1970s.

7 THE COURT: That's right.

8 MR. COOPERMAN: My point is that's erroneous and
9 that's what we want to show. That's a different account.
10 The account that Your Honor -- I can't tell what page you're
11 on, of course, but --

12 THE COURT: Well, I will say that the account with
13 most of the transactions which goes back to 1988 doesn't
14 show any transfers within two years, so chances are, unless
15 the law changes, the trustee is not going to be able to
16 recover anything in connection with that account.

17 MR. COOPERMAN: I'm not trying to recover anything
18 in this position.

19 THE COURT: The trustee is.

20 MR. COOPERMAN: I'm sorry. I thought you said me.
21 I'm sorry.

22 THE COURT: No, the trustee can only go back --

23 MR. COOPERMAN: I am sorry. I misheard you.

24 THE COURT: -- recover in an amount up to what was
25 transferred out in the last -- in the two years before the

1 filing date, although he computed net profits or net losses,
2 the trustee can go all the way back to the origin of the
3 account or at least until a Ponzi scheme began.

4 MR. COOPERMAN: Right. But the document you have
5 before you is a conglomeration of several accounts. The
6 accounts at issue, my client, as I said when I first started
7 talking, my client's account started in 1995, okay?

8 THE COURT: Okay.

9 MR. COOPERMAN: And the accounts that you have
10 flipping through -- I don't have that right in front of me,
11 but you just said 1988, for example.

12 THE COURT: Yeah, but the trustee -- I hear you,
13 but the trustee hasn't -- the trustee has given me
14 information regarding four separate accounts. The first
15 account, which is the one that goes back to 1988 has no
16 transfers within the last -- within the two years before the
17 filing date. So unless the law changes, that account is
18 essentially irrelevant.

19 MR. COOPERMAN: But the trustee's view is that
20 every single penny that my client had were from day one,
21 fictitious money that wasn't there. My point is different,
22 which is that we -- my clients inherited in 1995.

23 THE COURT: All right. But I guess there was an
24 interaccount transfer which is a separate issue that is
25 being litigated.

1 THE COURT: I understand that.

2 MR. COOPERMAN: But in the way it's calculated can
3 make a difference based upon the value that they gave to
4 these accounts in 1995.

5 And my point is that the trustee is going to
6 put -- what they would like to do, Your Honor, I think --
7 and we haven't really addressed the merits here yet because
8 this is only in jurisdiction -- but I can imagine the
9 trustee would spend about, you know, 20 minutes of an
10 evidentiary presentation and say strict liability, that's
11 it.

12 THE COURT: Right.

13 MR. COOPERMAN: Whereas we envision a much
14 different situation showing sort of our unique situation and
15 the choices that our clients had.

16 THE COURT: Well, you mentioned Emilie's
17 account --

18 MR. COOPERMAN: Yes, Your Honor?

19 THE COURT: -- and it shows that on May 1st, 1995,
20 a transfer of \$33,150,157 occurred presumably from some
21 other account. Are you saying that that number is not
22 correct?

23 MR. COOPERMAN: I am not saying one way or the
24 other. I haven't done the math.

25 THE COURT: Well, you're making a forum non

1 conveniens argument based upon the availability of witnesses
2 and what I'm getting at is whether you have any other
3 evidence in France or anywhere else which is going to
4 undercut that assertion?

5 MR. COOPERMAN: I think the -- well, the evidence
6 in France, which I would like to show, is that Emilie
7 Apfelbaum at the time basically could have taken her money
8 elsewhere, and had she done that, had she done that for a
9 year -- had -- just hypothetically, for example, Your Honor,
10 if the French guardianship judge said take all that BLMIS
11 money and put it in French Treasury bonds for four years and
12 then -- and she did that, and then at the end of the four-
13 year period, again, just hypothetically, she took that money
14 and she put it into BLMIS, I think we would all be saying,
15 well, that's when the value of her account should --

16 THE COURT: That's not what happened.

17 MR. COOPERMAN: I'm sorry?

18 THE COURT: That's not what happened.

19 MR. COOPERMAN: I know it's not happened, but what
20 we're trying to say is that it's a roughly analogous
21 situation. We would like the chance to show in France that
22 what happened, this wasn't some bookkeeping quick entry
23 where Emilie inherited. There was a very conscious decision
24 going on, a to-ing and fro-ing, so to speak, Your Honor,
25 with the judge about the -- about how to act.

1 THE COURT: But how does that affect the
2 computation of the net profits?

3 MR. COOPERMAN: Well, as --

4 THE COURT: For whatever reason, and I will accept
5 your reason, that BLMIS and withdrawals were made, which
6 based upon the calculations of the trustee under the net
7 investment method resulted in the receipt of net profits,
8 how does the reason why you left the money in the account
9 affect that analysis?

10 MR. COOPERMAN: Because --

11 THE COURT: And I'm not even sure the trustee
12 disagrees with you or disputes that that's why the money was
13 left in the account.

14 MR. COOPERMAN: Well, we haven't gotten to this
15 merits point in very much detail, Your Honor, but I think
16 the way it does is because there is a component of value,
17 you know, just hypothetically, Your Honor, if a BLMIS
18 investor originally put in a hundred million dollars and
19 took out ten million dollars, you know, that would be
20 different if he put in a hundred million dollars and took
21 out two hundred million dollars.

22 And so the value here, it's the say way, that to
23 us, what's very important is that this is a very unusual
24 French situation where French law was implicated based on
25 what the (indiscernible - 10:55:46) was doing at the time

1 and his allowing the money to -- and the judge allowing the
2 money to be with --

3 THE COURT: Just, if you can tell me how French
4 law affects what -- the amount of money that went in and the
5 amount of money that came out.

6 MR. COOPERMAN: So, I think, Your Honor, that the
7 French -- what -- my point is more. It goes to the
8 conscious decisions of my client at the time as to whether
9 to continue to invest with Madoff or not.

10 THE COURT: That's true in every one of these
11 cases.

12 The argument I thought you were going to make,
13 which is made in a lot of these cases, is had they pulled
14 the money out in 1995, there would be no fraudulent
15 conveyance.

16 MR. COOPERMAN: Well, that's true, too, Your
17 Honor.

18 THE COURT: That's argued in every case I have.

19 MR. COOPERMAN: Okay. Well, I guess not
20 successfully, so I have --

21 THE COURT: But that's not happened. That's not
22 what happened. I have to deal with what happened.

23 MR. COOPERMAN: I understand. I understand.

24 I think we have not gotten to merits discovery at
25 all here. We are just talking about personal jurisdiction

1 and that's the avenue that I would like to go down, and I
2 don't think -- and, Your Honor, for me to have any defense
3 in this case that would require French witnesses, I'm not
4 going to get their testimony and the reason is, is because
5 the French blocking statute, which has been briefed in this
6 case, the trustee points out that the French blocking
7 statute will not necessarily prevent my client from
8 testifying, and Your Honor could -- but there are some cases
9 potentially where Your Honor could order Laurence Apfelbaum
10 to testify, despite that.

11 But the fact is that for any non-party witness who
12 all in France, they will be affected by that.

13 THE COURT: I thought I saw -- and may be it
14 wasn't in France -- a lawyer who was deposed. Was that in
15 Switzerland or in France?

16 MR. COOPERMAN: That was in a magnify case, Your
17 Honor, and it was actually a Swiss attorney who was deposed
18 in the UK, and so it's not in our case. That's in the
19 magnify case, Your Honor.

20 So the other reason, Your Honor, about this is two
21 other reasons, Your Honor, about forum non conveniens. One
22 is hardship, and I hope nobody minimizes the hardship here.
23 We are talking about a French -- this is a French person who
24 doesn't come to the U.S. She speaks English. I will give
25 you that. She's not comfortable conversing in the situation

1 like we're having today.

2 THE COURT: Well, she can testify through an
3 interpreter as she did in her deposition.

4 MR. COOPERMAN: She has lost her money. I
5 guarantee you, Your Honor, that whatever the fee
6 applications we've put in, in this case, the trustee, I'm
7 charging a fraction of that amount. This is a huge
8 imposition. Her means of livelihood now -- she's a
9 psychologist, having to come here, she would have to give
10 that up. Her husband is an elderly person; he's 20 years
11 older. She would have to care for him. Her daughter is an
12 art gallery worker.

13 THE COURT: Let me ask you a question. I see you
14 videotaped her deposition once, couldn't we have a
15 videoconference trial or just videotape her deposition and
16 use it as if she's an unavailable witness? She doesn't
17 really have to come in on the merits.

18 MR. COOPERMAN: You know, in theory, Your Honor,
19 but I look at it a little differently, and the way I look at
20 it is you're talking about a person who, the day before
21 bankruptcy, thought they had a lot of money. Now they're
22 being sued for a lot of money.

23 THE COURT: Unfortunately true of many people.

24 MR. COOPERMAN: Understood. I'm not minimizing
25 any other person, but my point about this is, is that what

1 the trustee -- if the trustee's case is successful, this
2 will be something that will haunt both my clients for the
3 rest of their lives. They deserve -- I'm all for videotape
4 depositions. I'm for calls with Courts.

5 But when you're talking about the substance, when
6 you're talking about something of value to a person's
7 livelihood, I think it's only fair that the person does it
8 the traditional way. So I think that Your Honor, that
9 certainly, can you do it? Yes, of course, we can do it.

10 Is it fair and appropriate in this situation to do
11 it? I don't think so.

12 THE COURT: Well, I mentioned it because you
13 raised -- and I appreciate the argument -- the cost of
14 having to come to the United States, and it just seems to me
15 that there are ways to avoid that costs with videoconference
16 trials, video depositions, and you use that as her
17 testimony.

18 MR. COOPERMAN: But you give up something, Your
19 Honor. You give up -- you give up the fact that -- I've had
20 many trials, Your Honor, I'm sure you've had them before you
21 here where the witness tugs on your sleeve and tells you
22 something that you hadn't thought of. I lose that in that
23 situation, just as an example, Your Honor.

24 The bigger reason, Your Honor, and I think going
25 along with the hardship is this case is not going to be over

25 So, to me, the question is not only is it more

1 fair for my client to be in France where she signed the
2 French contracts, and for all of the reasons that I just
3 said, but it's fair, frankly, for the trustee. The point
4 about --

5 THE COURT: The trustee may disagree with you on
6 that.

7 MR. COOPERMAN: Well, I suspect their New York
8 counsel will, but the fact is that the trustee is -- the
9 interests of the trustee is to gather assets of the estate.
10 It doesn't really make a difference whether those assets
11 were gathered --

12 THE COURT: Would a French court apply U.S.
13 Bankruptcy fraudulent transfer law?

14 MR. COOPERMAN: I'm not an expert in French law.
15 I'm not an expert, Your Honor.

16 THE COURT: Maybe that's why the trustee selected
17 the New York forum. THE COURT: Maybe that's why the
18 trustee selected the New York forum.

19 MR. COOPERMAN: Could be, Your Honor, I don't know
20 one way or the other, I think it's just easier because they
21 sued an awful lot of people here. But the fact is, is that
22 there are avenues in France, and whether -- you know, if --
23 and I'm no expert in French law, but I assume that if
24 whatever -- if whatever New York bankruptcy law is, is
25 contrary to French law, whether this be France, England,

25 MR. COOPERMAN: We can certainly do that. I just

1 wanted Your Honor to have the comfort of knowing that that's
2 what French law was.

3 THE COURT: Okay.

4 MR. COOPERMAN: Thank you, Your Honor.

5 MS. COLE: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MS. COLE: Tracy Cole for the trustee.

8 THE COURT: Go ahead.

9 MS. COLE: I just wanted to respond a little bit
10 to some of the things that Mr. Cooperman was discussing.

11 As Your Honor recognizes this is a fraudulent
12 transfer case, there -- currently as the law stands right
13 now we are only suing for the two-year fraudulent transfer
14 of fictitious profit, there's no allegation of bad faith,
15 it's a strict liability case, the evidence and the witnesses
16 are all in New York.

17 I don't believe that the crucial facts are in
18 dispute here. They -- they acknowledge that they've
19 received -- the two-year number is \$25 million.

20 THE COURT: Well let's talk about the contacts
21 that these defendants have with the United States.

22 MS. COLE: Sure.

23 THE COURT: Go ahead.

24 MS. COLE: The contacts include that they have --
25 they've received the \$25 million within the last two years

1 that they will be receiving transfers from it, and that
2 firmly establishes in itself personal jurisdiction under law
3 of this case and CPLR, and I don't think any of that is in
4 dispute.

5 The case law that Mr. Cooperman was discussing, he
6 talked a lot about just maintaining an account and passive
7 receipt of income. That's not what this case is about.

8 He cited one case, the Societe Generale case was a
9 correspondence bank account case which even under New York
10 law apparently having a correspondent bank account does
11 appear to subject you to jurisdiction, but that's not what
12 we're dealing with here, we're dealing with a brokerage
13 account where they're actively seeking to invest in the
14 United States, actively seeking to benefit from that
15 investment, make profit from that investment, and are in
16 fact receiving the profits from that investment.

17 The Divinsky case that he talked about where he
18 talked about the passive receipt of funds, that was under
19 the tortious activity prong of the CPLR, that wasn't a case
20 like this is where we're talking about transacting business
21 in the State of New York, and that's what was happening
22 here.

23 There's no case law that I'm aware of that
24 suggests that purposefully investing in a brokerage account
25 in New York and taking the money out of that brokerage

5 For example, I think one of the things
6 Mr. Cooperman talked about was well, there are only a few
7 documents so the trustee is incorrect when he says that --
8 when he characterizes Ms. Apfelbaum's activity in her
9 account. But I think what he's objecting to is our
10 characterization. I don't think it's disputed, she
11 testified that she communicated with Mr. (indiscernible -
12 01:00:52) at least twice a year to make sure that he was on
13 top of the accounts. She was directing withdrawals of the
14 accounts from the accounts. And she was making sure that
15 they complied with the rules that she thought were necessary
16 to maximize her advantage and minimize her tax consequences.

22 I want to be clear, something -- he said something
23 was not contested. Anything about their tax liabilities or
24 what they used the money for we cannot attest because we
25 have not seen their financial records or their tax returns.

1 They have withheld those based on the French blocking
2 statute. We do intend to litigate that when we get to the
3 merits of this case, but that has nothing to do with
4 personal jurisdiction right now. I just wanted to be clear
5 when he says it's unrebutted or undisputed we don't have
6 evidence on it.

7 I think he made a reference to French treasury
8 bills. I just want to be clear the bills in this case were
9 all U.S. treasury bills.

10 THE COURT: I thought that the French court
11 required that 50 percent of Emilie's account be invested
12 into French treasury bills?

13 MS. COLE: Those were taken out of Madoff.

14 THE COURT: There was nothing was there? There
15 were no actual investments were there?

16 MS. COLE: That money was taken out of Madoff and
17 that's not the subject of this lawsuit.

18 THE COURT: Okay. Okay.

19 MS. COLE: So the half that remained in Madoff is
20 the subject of (indiscernible - 01:02:21).

21 Right. Similar with the trading strategies. I
22 don't think that there is a dispute that, you know, how
23 sophisticated she was about trading strategy --

24 THE COURT: Well but you see there is and that's
25 because you make the statement that they were ordered. I

1 Honor, I -- one question I thought Your Honor was going to
2 ask Ms. Cole was on UGC are they litigating any cases in
3 France?

4 THE COURT: But how is that relevant?

5 MR. COOPERMAN: Because she just said that we, the
6 trustee, wants to litigate everything here in the United
7 States, so I don't know the answer to that, I can't tell
8 from the fee application --

9 THE COURT: Well but how is it relevant?

10 MR. COOPERMAN: Because I think it undercuts the
11 trustee's current argument that everything should be in the
12 United States, forum non-convenience is a discretionary
13 situation where the judge can have discretion, and if the
14 French trustee has -- I mean, I'm sorry -- if the French
15 counsel is litigation cases there and the trustee has hired
16 the -- you know, French counsel and the application for that
17 very purpose I think it is relevant to say it can be done.

18 THE COURT: Well obviously -- obviously the
19 trustee has hired French counsel.

20 MR. COOPERMAN: Obviously.

21 THE COURT: Obviously the trustee is not
22 litigating this case there.

23 MR. COOPERMAN: I understand.

24 THE COURT: And I guess what you're saying is it's
25 equally convenient for the trustee to litigate there as

1 here.

2 MR. COOPERMAN: That's correct.

3 THE COURT: Whereas the same is not true of your
4 clients.

5 MR. COOPERMAN: That's correct, Your Honor.

6 THE COURT: I understand.

7 MR. COOPERMAN: I'm violating every -- yeah, I'm
8 -- that's it.

9 The only other thing I'd want to say, Your Honor,
10 is the Divinsky case, it's under a different prong of CPLR
11 302(a); however, it still requires the same arising under as
12 we said as in any of the other cases. It's a very on point
13 case.

14 THE COURT: But my recollection of the tort
15 provision in the CPLR is it had to have foreseeable
16 consequences in the state that's applicable to the CPLR
17 provision a long time, but that's my --

18 MR. COOPERMAN: They are different --

19 THE COURT: -- but there is a distinction or
20 difference between the tort long arm jurisdiction and the --

21 MR. COOPERMAN: I think it's a slight --

22 THE COURT: -- general long arm jurisdiction.

23 MR. COOPERMAN: I think it's a slight distinction
24 because the practical -- the practical effect is in both
25 situations unlike general jurisdiction you're looking at the

1 event in New York and does the claim arise out of that event
2 in New York? The tort is saying it differently, but that's
3 really what it comes down to.

4 THE COURT: Okay.

5 MR. COOPERMAN: And the last thing I would say,
6 Your Honor, is again, Your Honor looks like you're very
7 thoughtful about this. I would simply ask that to the
8 extent you think there's any dispute on the facts that to
9 please carefully look at the record evidence, because I do
10 not believe it supports a lot of what Ms. Cole said about
11 our act of involvement and what we did.

12 THE COURT: All right. Let me try this with the
13 facts to avoid the possible need to bring your clients in,
14 although this is not a motion for summary judgment, I'm
15 going to adopt that procedure.

16 I'm going to ask the trustee to submit a statement
17 of what he considers to the material jurisdictional facts.
18 Avoid the adverbs, avoid the adjectives, avoid the
19 conclusory statements, with a citation to some evidence that
20 I already have. I'll give you a chance then, Mr. Cooperman,
21 to either say, yeah, I admit that that's what the fact is,
22 add additional facts or deny, but explain if you're going to
23 deny a citation to authority.

24 MR. COOPERMAN: Sure.

25 THE COURT: If I can resolve it that way and I

1 don't need to have a further evidentiary hearing that's
2 fine, but if there are disputes regarding material issues of
3 fact then we'll have to talk about a practical way to -- you
4 know, to deal -- to resolve that issue.

5 MR. COOPERMAN: It seems very fair to me, Your
6 Honor.

7 THE COURT: All right.

8 MR. COOPERMAN: When would you like the
9 submissions?

10 THE COURT: That's what I'm going to ask. When
11 can you submit -- all I want is a statement, each separately
12 numbered paragraphs, short statement with the citations of
13 authority of the undisputed material facts regarding
14 personal jurisdiction?

15 MS. COLE: Just vacation schedules.

16 THE COURT: Okay.

17 MS. COLE: Just one second. Sorry.

18 THE COURT: This case has been going on for years.
19 I appreciate the fact that it's August.

20 MS. COLE: Two weeks just because of vacation
21 schedules would be helpful.

22 THE COURT: All right. Let's say two weeks from
23 today is the 20th. And when can you submit your response?

24 MR. COOPERMAN: May I just turn this on to look at
25 my calendar a second?

1 THE COURT: Sure.

2 MR. COOPERMAN: I'm happy to report, Your Honor,
3 that the brains behind the operations, Ms. Clarkdale (ph),
4 is getting married in September.

5 THE COURT: Congratulations.

6 MS. CLARKDALE: Thank you.

7 MR. COOPERMAN: So I want to make sure --

8 THE COURT: So it'll be before that.

9 MS. CLARKDALE: Before then, yeah.

10 MS. COOPERMAN: I don't think she wants to do this
11 on her honeymoon. How about by September 5th, Your Honor?

12 THE COURT: That's fine.

13 MR. COOPERMAN: Okay. Yeah, that's perfect.

14 THE COURT: Okay. And then I'll deem the matter
15 submitted.

16 MR. COOPERMAN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MS. CLARKDALE: Thank you, Your Honor.

19 THE COURT: Unless I need a further conference
20 regarding the facts.

21 Thank you very much.

22 MR. COOPERMAN: Thank you, Your Honor.

23 (Recess at 11:16 AM)

24 THE COURT: Hello?

25 MR. ELLIS: Hello?

1 THE COURT: Is this Mr. Ellis?

2 MR. ELLIS: Yes, it is.

3 THE COURT: Okay. I'm sorry. You got behind a
4 long matter. I called your matter first.

5 This is Judge Bernstein and I have a
6 representative of the Trustee here, Mr. Cremona.

7 I scheduled this hearing because I received your
8 letter and your letter raised an issue about the Trustee's
9 disallowance of the claim and you seem to be confused
10 between the fund that the trustee is beginning to administer
11 and the fund that the Department of Justice or Richard
12 Breeden, which is a victim's fund, is going to be
13 administered.

14 So tell me about -- tell me about your claim.

15 MR. ELLIS: Well, I don't know much about it. I
16 had -- earlier this year I was receiving some kind of
17 threats, what I took to be threats and I hired an attorney
18 and I went through what was going on with him and he
19 suggested that I contact your court or at least the trustee
20 and try to explain to the Court what was going on. In other
21 words, after I had also received that Bernard Madoff Victim
22 Fund notice and so forth. And so it left me totally
23 confused as to if they were connected because I had sent the
24 same information in originally on the original claim back in
25 2008 or '09 as sent to the Madoff Victim Fund claim and it

1 left me totally confused and, of course, at my age, it
2 doesn't take much for that anymore.

6 THE COURT: Okay. Do you understand that there's
7 a separate victim's fund that has nothing to do with this
8 case, except that it obviously is designed to compensate
9 victims of Madoff's fraud?

12 THE COURT: And the trustee, as I understand it,
13 disallowed your claim because there was no evidence that
14 the, I think it's the Lawrence Ellis Trust ever had an
15 account with Madoff.

17 MR. ELLIS: I don't claim to have an account with
18 Madoff, no, sir. That's not what I was claiming.

21 MR. ELLIS: Yes, I am a victim of Madoff's fraud.

23 MR. ELLIS: Well, it seems that my bank at the
24 time that held my assets in trust used those assets to
25 eventually get them into the hands of Madoff.

1 THE COURT: Okay. So you invested in a trust or
2 had an interest in the trust and the trust invested?

3 MR. ELLIS: Well, no. It was me as an individual.
4 The trust was actually performing along with another
5 organization as the transfer agents of those assets from one
6 position with Bank of America in California to a bank, a
7 National Bank in Mississippi.

8 THE COURT: Did you -- Mr. Ellis, did you ever
9 receive a monthly statement from Bernard Madoff?

10 MR. ELLIS: Not to my recollection. I don't
11 recall that.

12 THE COURT: Okay. It sounds to me like the
13 Trustee properly denied your claim as to the fund that he's
14 administering because you didn't have an account with
15 Bernard L. Madoff Investment Securities, but you may have
16 claims to the victim fund that's being administered by
17 Mr. Breeden, and I think his address was in the letter that
18 the Trustee sent to you.

19 MR. ELLIS: Yes, we have been in touch with them,
20 but like I said, I was so confused.

21 THE COURT: Yeah. Well, it's confusing.

22 MR. ELLIS: But I was confused about how it would
23 work.

24 THE COURT: Okay. Do you understand it now, that
25 you should be communicating with Mr. Breeden about your

1 victim fund claim?

2 MR. ELLIS: Yes, sir. I think the Trustee sent me
3 a letter and explained the difference between the two parts
4 and that was sufficient and I took that at word, as was
5 written.

6 THE COURT: Okay. I just wanted to make sure that
7 you understood. I'm not going to do anything further in
8 this matter and I suspect that the Trustee isn't and you
9 should pursue whatever claims you have with the victim's
10 fund.

11 MR. ELLIS: Okay. Well, I'm very grateful to you.
12 I didn't mean to do anything other than just find out how I
13 was involved.

14 THE COURT: Okay. All right. Thank you very
15 much.

16 MR. ELLIS: Okay. Thank you.

17 Bye, bye.

18 THE COURT: Okay. I'm just going to mark that
19 off. He seems to understand now.

20 MR. CREMONA: Understood.

21 Thank you, Your Honor.

22 THE COURT: All right. Sorry you had to sit here
23 all morning. Thank you very much.

24 MR. CREMONA: It was quite interesting.

25 THE COURT: I wonder if I could just

1 (indiscernible - 11:25:33). There's that.

2 (Whereupon these proceedings were concluded at
3 11:25 AM)

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C E R T I F I C A T I O N

We, Dawn South and William J. Garling, certify that the foregoing transcript is a true and accurate record of the proceedings.

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